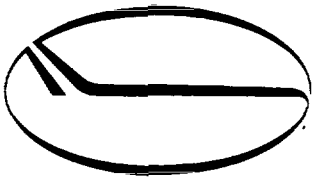
P-1354



Air Transport Association

RSPA-1998-12606
177580

December 31, 1997

Mr. Alan I. Roberts
Associate Administrator for Hazardous Materials Safety
Research and Special Programs Administration
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

Re: PETITION FOR AMENDMENT TO 49 CFR §175.31

Dear Mr. Roberts:

The air carriers represented by the Air Transport Association of America [1] petition for amendment to 49 CFR 175.31 for relief from enforcement action as a result of complying with the reporting requirements of this section. The relief proposed here will encourage the identification of improper hazardous shipments. This amendment thereby will result in enhanced compliance and promote public safety.

Petition for amendment to 49 CFR § 175.31 is attached.

We urge RSPA to open a rule making proposing the amendment to §175.31 that we seek here. The seriousness of concealed hazardous materials mandates that the air carrier industry and the FAA work together cooperatively for the advancement of public safety. The reasons for doing so are compelling and we stand ready to assist the RSPA in an appropriate manner.

Respectfully submitted,

Frank J. Black
Director,
Cargo Services

[1] The ATA membership comprises 22 of the largest commercial passenger and freight air carriers in the United States: Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, America West Airlines, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, KIWI International Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service and US Airways. Technical members of ATA include Aero Mexico Air Canada, Canadian Airlines International, KLM Royal Dutch Airlines, and Mexicana

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PETITION FOR
AMENDMENT TO
49 CFR §175.31

Air carriers represented by the ATA[1] petition for amendment to 49 CFR 175.31 for relief from enforcement action as a result of complying with the reporting requirements of this section. The relief proposed here will encourage the identification of improper hazardous shipments. This amendment thereby will result in enhanced compliance and promote public safety.

Proposed Amendment

The current text of §175.31 establishes a requirement for air carriers to report any discrepancy involving a hazardous material detected *after* the package has been accepted for air transport. The definition of "discrepancy" is included in the regulation, so that it is understood to be a term of art within the regulations:

§175.31 - Report of discrepancies.

(a) Each person who discovers a discrepancy, as defined in paragraph (b) of this section, relative to the shipment of a hazardous material following its acceptance for transportation aboard an aircraft shall, as soon as practicable, notify the nearest FAA Civil Aviation Security Office by telephone and shall provide the following information:

(1) Name and telephone number of the person reporting the discrepancy.
(2) Name of the aircraft operator.
(3) Specific location of the shipment concerned.
(4) Name of the shipper.
(5) Nature of discrepancy.

(b) Discrepancies which must be reported under paragraph (a) of this section are those involving hazardous materials which are improperly described, certified, labeled, marked, or packaged, in a manner not ascertainable when accepted under the provisions of §175.30(a) of this subchapter, including:

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(1) Package which are found to contain hazardous materials;
    (i) Other than as described or certified on shipping papers;
    (ii) In quantities exceeding authorized limits;
    (iii) In inside containers which are not authorized or have improper closures;
    (iv) In inside containers not oriented as shown by package markings;
    (v) With insufficient or improper absorption materials, when required; or
(2) Packages or baggage which are found to contain hazardous materials subsequent to their being offered and accepted as other than hazardous materials.

We propose to add to these provisions a new paragraph (c) as follows:

> (c) Carriers reporting discrepancies under this section shall not be subject to civil penalties for acceptance of reported hazardous materials if such hazardous materials were improperly described, certified, labeled, marked or packaged by the shipper through no fault of the carrier.

It should be noted that the proposed paragraph (c) would only apply to "carriers reporting discrepancies" under Section 175.31. Air carriers making reports under §175.31 should not be penalized for innocent acts with respect to the inadvertent acceptance of undeclared hazardous materials. Enunciating such a policy for a carrier that is without fault reflects basic due process, and will promote compliance and encourage carrier efforts to identify and report discrepancies. Current FAA policy has a "chilling effect" on discovery efforts and provides no incentive for carriers to establish programs designed to identify such discrepancies. Reporting carriers are at constant risk of FAA enforcement action, often on facts that reasonable minds would agree are not readily ascertainable at acceptance.

Background

The Agency often states that a "knowing violation" of the HMR has occurred in spite of considerable facts which reveal that the carrier had no actual knowledge until the discrepancy was discovered. Such findings often involve "leading" or "suggestive" descriptions that fall outside the terminology protected by the HMR. In other cases, the FAA has based an alleged violation on the presence of a marking that is not protected by the regulations but may, in some instances, be a proper shipping name. At times, markings or labels obscured or deleted by shippers are used as a basis for violation, when in fact such deleted markings may not have been noticeable or would more reasonably be interpreted as indications of a re-used package.

In still other situations, FAA has ascribed fault to carrier personnel when marked and labeled packages have been concealed by third parties in consolidated shipments not directly handled by the carrier's personnel.

Air carrier objections to the Agency's policy of pursuing the reporting carrier for such discrepancies are based on sensible, well justified considerations. For example[2]:

- Packages with obscured marks and labels, which a reasonable person would interpret as unremarkable or believe to be reused, are alleged to be a basis for a "knowing violation" in the event they are *later* found to contain hazardous materials reported as a discrepancy. In contrast, carriers are not aware of the FAA actively pursuing the investigation of packages displaying obscured markings and labels that do *not* contain hazardous materials. This suggests the selective and tenuous nature of FAA policy.[3]

- The display on a package of suggestive words printed in minuscule lettering, in non-standard format, has been taken by the FAA as the basis for a "knowing violation."

- Markings or waybill descriptions that represent entire categories of materials, of which only a small proportion are hazardous, have been used as the basis for alleging a "knowing violation." Examples of these terms include "Paint," "Chemicals, n.o.i.," and "Spray bottles." Considering that approximately 80% of paint in transportation is non-hazardous, that not all spray bottles need be pressurized and, that everything in this world is made of chemicals, the basis for alleging a "knowing violation" must be more than the mere inclusion of these terms in such documents.

- Inaccurate waybill descriptions that have no possible hazardous materials connotation (e.g., "water-based paint," or "analytical standards, not restricted") have been used as the basis to allege "knowing violations" on the part of carriers when the contents were *later* found to contain hazardous materials.

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[2] Additional examples are provided in Attachment A.

[3] If the FAA maintains that a carrier commits a "knowing violation" for transporting a package holding hazardous materials and displaying marks and labels that the shipper has obscured, then transportation of a package with *non-hazardous* contents would also be a violation if it displayed the same obscured markings and labels. The lack of cases based on this reciprocal package condition demonstrates that, in contradiction of FAA's policy, obscured markings and labels *cannot* be a sound basis for a "knowing violation."

Detection and Communication

It is important to recognize that a carrier may handle millions of packages in a single day. Operational and practical necessity suggests that a high-intensity inspection for every package is impossible. The regulations have recognized this by creating an environment under which a package is presumed to be non-hazardous unless a shipper specifically identifies it as otherwise. In air commerce, hazardous materials are correctly regulated as exceptions and not the rule. It is only when a shipper presents a shipment as hazardous that the requirements for a detailed inspection under §175.30 become effective.

While air carriers devote much attention to the detection of undeclared hazardous materials, the simple fact is that there are no definable patterns which, if taught to personnel, would lead to the discovery of every improper hazardous shipment. Despite a carrier's best efforts at detection, training and certification, discrepancies occur and will continue to occur unless corrective efforts are directed at the source. The failure to recognize this is unrealistic and misplaces the focus of efforts to improve hazardous material compliance. FAA's existing enforcement policy treats the symptom, while ignoring the disease (improper preparation of hazardous materials by the shipper.) The cure is surely to educate and motivate compliance through pro-active programs rather than penal policy.

The Case For Regulation Reform

Current regulations require carriers to report discrepancies that were not ascertainable at acceptance. Failure to make a required report results in a violation of the regulation. FAA policy has resulted in carriers facing a situation that requires them to report and then be placed at the mercy of subjective, after the fact, interpretation of acceptance conditions.[4]

The industry believes that the description of "discrepancy", as defined in §175.31, supports their request for relief from the FAA's enforcement practices. Clearly, the wording of the regulation demonstrates that RSPA (or its predecessor agency) anticipated that, at the time of acceptance, an air carrier cannot be expected to detect every hazardous material that is concealed through the ignorance or design of the shipper. In fact, the regulation plainly recognizes that: "Discrepancies which must be reported under paragraph (a) of this section are those involving hazardous materials which are improperly described, certified, labeled, marked, or packaged, *in a manner not ascertainable when accepted under the provisions of §175.30(a)* of this subchapter ..."

[4] The agency's procedures for prosecuting alleged violations only exacerbate this problem. The carrier must defend itself to the same agency that enforces the regulations, and must exhaust appeals within this agency before it can gain a hearing before an independent court.

This language establishes that air carrier reporting requirements apply only to hazardous materials "not ascertainable" at the time of acceptance. Yet, when a carrier reports a "not ascertainable" shipment under this Section, the FAA pursues the reporting carrier alleging a "knowing violation" based on the Agency's assertion that the carrier "should have known." The contradiction is at once obvious. If the air carrier knew or should have known the shipment was hazardous, then the shipment must have been ascertainable and thus outside the reach of §175.31(a). If the FAA's logic is to be believed, then there would be few situations in which an undeclared hazardous materials discrepancy would meet the definition established in the regulations and thus, there would be no need for air carriers to report discrepancies.

In order to resolve this contradiction and to preserve the intent of the regulation, the air carriers seek the addition of proposed paragraph (c). This addition would encourage air carriers to report under the provisions of §175.31. Our proposal is simple and direct. We ask that when a carrier reports a hazardous materials discrepancy to the FAA under §175.31, that the carrier be granted immunity from enforcement actions related to that report. For the reasons previously stated, we believe this proposal to be in the public interest.

Anticipated Objections

We anticipate concern that such reporting immunity would be used by carriers to shield themselves from mistakes in their own operations. This concern is without substance. By tying the exemption to *carrier reports of shipper errors* under §175.31, there would be no effect upon FAA enforcement of identifiable carrier acceptance errors. It should be recognized that §175.31's definition of "discrepancy" is protected in the proposed paragraph (c). Carriers would continue to report but would be exempt from civil penalties for the acceptance of non-ascertainable discrepancies. These are defined in the regulation as:

- Packages which are found to contain hazardous materials other than as described or certified on shipping papers;
- Packages containing hazardous materials in quantities exceeding authorized limits (but not discernible in routine acceptance checks);
- Hazardous materials in inside containers that are not authorized or have improper closures;
- Hazardous materials in inside containers not oriented as shown by package markings;

- Hazardous materials found to have insufficient or improper absorption materials, when required; and

- Packages or baggage that are found to contain hazardous materials subsequent to their being offered and accepted as other than hazardous materials.

We submit that in any situation where a carrier asserts lack of knowledge due to reasons found in §175.31, the FAA must bear the burden of showing *willful* carrier conduct. In the absence of willful conduct, air carriers should not be subject to punitive enforcement policy. Ultimately, by encouraging accurate reporting and the identification of the problem source, the amended regulation will benefit public safety.

Conclusion

The air carrier industry supports the RSPA's efforts to uphold the communications standards of the HMR. To that end, shippers must become knowledgeable in the application of required marks and labels and the utilization of paperwork with required data fields and certifications. It seems obvious that a policy that encourages problem resolution at the tender site will best serve to advance these efforts. Enforcement directed at the innocent acts of air carriers has no deterrent effect and does nothing toward achieving the desired results.

Air carriers that report discrepancies should not be punished for their honesty of purpose. The industry believes that without the proposed language, FAA policy will continue to create the risk of driving information underground.

We urge RSPA to open a rule-making proposing the amendment to §175.31 that we seek here. The seriousness of concealed hazardous materials mandates that the air carrier industry and the FAA work together cooperatively for the advancement of public safety. The reasons for doing so are compelling and we stand ready to assist the RSPA in an appropriate manner.

ATTACHMENT A
(4 Pages)

Carrier #1:

Cases at the "Letter of Investigation" Level

Note: Such cases waste carrier resources even if no violation has occurred.

In 1996, a carrier reported a spill from a shipment devoid of hazard marks or labels for which the waybill stated, "*Peinture a l'eau*" or "*water based paint.* FAA letter: "Considering this description information, we believe the shipment should have been refused by [the carrier.]"

- FAA closed the case without action after strong carrier objection.

Carrier reported a spill from a package that had no shipping paper, no hazard labels, no proper shipping name and no UN number. However, a consumer-directed pamphlet attached to the package stated in letters one-sixteenth inch high "R10 Flammable liquid," which FAA alleges constituted a basis for pursuing a "knowing violation" against the carrier.

- Carrier objected strongly. Case remains open; status unknown.

A carrier reported an unmarked shipment of fire extinguishers, detected after one of the extinguishers released. FAA alleges violation due to AWB statement, "(4) Fire Extinguishers." Carrier investigation revealed that enclosed commercial invoice on company letterhead characterized the shipment as "non-hazardous," which was the basis for permitting the shipment into the system. The invoice was available to FAA in their investigation.

- Case remains open; status unknown.

A carrier took the responsible step of reporting a spill of mercury shipped undeclared in air freight even though it was no longer in the carrier's possession, but rather had been discovered by vendor. FAA alleges that the words "clinical thermometers" on the packages (handled in SEL by Koreans!) constitute a knowing violation.

- Case remains open; status unknown

Cases at the "Notice of Proposed Civil Penalty" Level

In 1991, a carrier reported to FAA a spill of flammable paint from a package. The package displayed the marking "Paint, UN1263," which was crossed out. A Flammable Liquid label had been covered by address and tracking labels.

- FAA has proposed $25,000 penalty and has held an informal conference. The carrier continues to fight the case.

In 1992, a carrier reported to FAA a spill of flammable paint from a package. The package displayed the hand-written marking "Paint." There was no UN number or hazard label.

- FAA has proposed a $60,000 penalty and has held an informal conference. The carrier continues to fight the case.

Cases Closed with Warning Letters

Note: A Warning Letter is counted as a violation even if no fine has been exacted.

Carrier reported a spill from a package that was devoid of hazard label or any hazard markings. The waybill description stated "Paint sample; printed matter."

- FAA closed case with a warning letter. Carrier had argued the term "paint sample" was not definitive as a hazard description.

Carrier #2:

Cases at the "Letter of Investigation" Level

For non-declared shipment. Carrier notified the FAA concerning no markings, labeling or documentation. Shipper had written "Spray Bottles of Paint" on the airbill.

For discrepancy concerning acceptance of package that was marked "storage boxes" on the carton. Carrier notified FAA concerning inner packaging discrepancies. Shipment did not require any specification packaging or any tested package.

For non-declared shipment. Carrier notified FAA concerning no markings, labeling or documentation. Shipper had verbiage on small label in small print with the word "paint."

For non-declared shipment. No markings, labeling or documentation. The shipper had written "Frozen Fruit Juice Concentrate" on the airbill.

For non-declared shipment. No markings, labeling, or documentation. The shipper had written "Analytical Standards for Research Purposes Only" on the airbill.

Carrier #3

Air carrier acting on behalf of Carrier #3 accepted a 199 piece shipment from a national trucking company for air transportation. Shipper certified on airbill that shipment did not contain hazardous material. Shipper indicated FAK (freight all kinds) in Nature and Quantity of Goods. The box was stamped on the outside with the following information: WINCHESTER Double. In 3/8" lettering, -"12 ga.3 in. Shotshell, 00 buck (15 pellets) copperplated shot." In another area on the outside of the box, printed in 3/8" lettering, "Cartridges, small arms UN0012."

When the airplane was unloaded at destination, Carrier #3's agent observed the box and noted that it was not listed on the Pilot Notification Form. Carrier #3 advised the FAA of the UNDECLARED HAZARDOUS MATERIAL shipment.

This case is still open.

[This is a typical situation when a consolidated shipment is offered to an air carrier. The paperwork may indicate that the shipment does not contain Hazmat, but in the middle of a shipment is a box the shipper fails to identify. If the shipment is shrink-wrapped and the pallet is loaded as offered, it is even more difficult to discover the undeclared box.]

Carrier #4

While ramp personnel of air carrier acting on behalf of Carrier #4 were loading cargo onto a departing aircraft, they discovered one (of a 29-lot) labeled but undeclared piece, which contained oxygen generators. This piece was labeled with both 5.1 and CAO labels. This piece was not loaded on the flight. Carrier #4 advised agent to contact the CASFO in their area to report the discrepancy. Subsequently, it was discovered that the cargo was Carrier #4's COMAT being returned to their hub from an OSV (outside vendor) outside the US. The OSV had been contracted by Carrier #4 to complete heavy maintenance on DC-10 equipment. The OSV was returning unused parts to Carrier #4's warehouse and distribution center where they were to be restocked if usable sent for repair, or disposed of. The OSV had contracted with an international freight forwarder to arrange for transportation of these parts to Carrier #4.

Carrier #4's contract with OSV does not permit carrier personnel to participate in any functions that are contractor responsibility. The parts and other material were packed by OSV and/or freight forwarder and tendered to a foreign air carrier as 29 pieces, then interlined to a second foreign carrier. Upon arrival in the US, Carrier #4 had the original skid with 29 pieces trucked to another city for storage and then continued air transport. There was no indication of the presence of hazmat during shipment until the ramp personnel on the final leg of the journey discovered it.

Carrier #4 disputes that it is guilty as FAA contends of offering and/or accepting dangerous goods not properly declared (49CFR 171.2(a),) failure to complete the dangerous goods documentation (49CFR172.602,) or failure to provide an emergency telephone contact (49CFR 172.604(b).)

Carrier #4 contends that such actions tend to encourage carriers to remain silent regarding discrepancies and to take the risk of a penalty if/when FAA discovers a discrepancy that turns into a violation.

In another incident: While unpacking a shipment of unused parts and materials received from an OSV, Carrier #4 Warehouse and Distribution personnel discovered undeclared oxygen generators. Contracted to do heavy maintenance on DC-10 aircraft, the OSV had contracted a freight forwarder to arrange for transport of parts and materials to Carrier #4. The OSV packaged the items and the freight forwarder picked them up. At the warehouse, the forwarder built the 72 pieces into a shipping container (LD-11). The Cargo was tendered to Carrier #4 as revenue Cargo. As the freight forwarder was a "known shipper" and had provided the required "shipper's security endorsement," the shipment was accepted without additional inspection.

The LD-11 was transported by air and taken to the cargo facility where it was broken down and released to the freight forwarder who delivered it to the Carrier #4's Warehouse and Distribution Center. Here personnel discovered the box containing 7 oxygen generators with safety caps installed and in the disarmed position and 1 life vest.

The initial report was a message on the CASFO answering machine.

Carrier #4 participated in the FAA investigation and conducted an internal investigation. Despite cooperation by the carrier, FAA has indicated its intention of charging carrier with the

transportation of prohibited items and contends carrier is responsible for the improper shipment of the items. FAA recognized that OSV was using improperly trained personnel. Once again, carrier could have remained silent and FAA would not have known the discrepancy.